

EXHIBIT 8

Josh Blackman, “My Rejected Proposal for the AALS President’s Program on Diversity: The Effect of Model Rule of Professional Conduct 8.4(g) and Law School Pedagogy and Academic Freedom” (Nov. 15, 2016)

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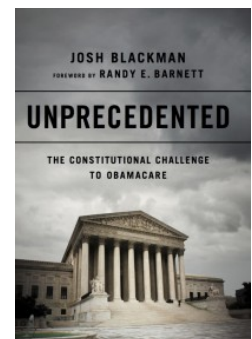
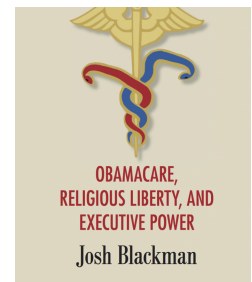
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the AALS President's Program on Diversity: The Effect of Model Rule of Professional Conduct 8.4(g) and Law School Pedagogy and Academic Freedom

Nov 15, 2016 | ★★★★★

This year, the AALS issued a call for papers for the President's Program on Diversity:

Much fine scholarship has, in recent years, addressed important diversity issues surrounding gender, religion, race, viewpoint, disability, and sexual



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orientation. Tying in to recent events on and off campus, our colleagues in the legal academy have addressed questions of racial equity and inclusion in their teaching and scholarship. Many law schools are now engaged in heightened and new forms of institutional attention on racial and other forms of equity. Some of this heightened inquiry has been prompted by our own reflection on major social issues, including highly visible racial disparity issues in our criminal justice system; however, social and campus protests, including those of the Black Lives Matter movement, have also spurred greater focus.

This President's Program and associated papers will seek to answer questions, including:

- What are the challenges and opportunities for the legal academy in this social and campus climate?**
- Does our community have a special role to play as our schools, universities, and civil society confront critical issues surrounding the various diversity issues of concern?**
- Are there tensions or synergies between traditional academic values of academic freedom and viewpoint diversity with heightened commitments to racial and other forms of equity and inclusion?**

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I submitted a proposal on intellectual diversity: The Effect of Model Rule of Professional Conduct 8.4(g) and Law School Pedagogy and Academic Freedom.

It was not selected.

In any event, here is my proposal, which I will write about at some point:

In August of 2016, the American Bar Association added to Model Rule of Professional Conduct 8.4 a new section (g), that provides, in part: "It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." This well-intentioned rule, which leaves key terms ill-defined, could have unintended consequences for law school pedagogy and academic freedom.

Before this amendment, Comment 3 to Rule 8.4 prohibited an attorney from "knowingly manifest[ing] by words or conduct bias or prejudice" "in the course of representing a client" when such conduct was "prejudicial to the administration of justice." The former sphere of misconduct was fairly narrow. The new Rule 8.4(g) applies far more broadly to any "conduct related to

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the practice of law,” which is defined in a comment to include “representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.” At a minimum, this provision applies to law professors who speak at bar functions or offer continuing legal education classes. This would also include presentations at other “social activities in connection with the practice of law,” such as the Federalist Society, the American Constitution Society, and even the AALS.

Further, the new rule could reasonably be read to sweep in a host of law school activities. The comments specifically countenances such jurisdiction: “Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.” This explanation is far more specific than the proposed version, which merely stated that “Paragraph (g) does not prohibit conduct undertaken to promote diversity.” That the ABA went out of its way to explain that

activities to “promote diversity” in law schools were permissible, suggests that Rule 8.4(g) can in fact reach activities within law school. In addition to law student organizations, law school clinics also clearly fall within the umbrella of Rule 8.4(g). Clinical professors will have to govern their lectures to comply with this rule.

Whether doctrinal classes are covered by this admonition is a far closer call. If in the course of a contracts class, a professor offers several litigation tips, is that “related to the practice of law”? If during a torts class, a professor recalls a case she worked on in practice, and uses that as a teaching moment, is that “related to the practice of law”? Read more broadly, graduation from an accredited law school is a prerequisite to practice law. Required courses would all seem to be “in connection with the practice of law.” Even then, it would be difficult to argue that students should avoid electives. The term is ill-defined in the Model Rule, and could be read capaciously to cover a host of activities within law school.

As a result, once law professors with active law licenses are bound by this rule, the burden shifts to them to ensure their pedagogy does not constitute “harassment.” This measure, no doubt well-intentioned, can have a chilling effect on

classroom discussions. Pure verbal “harassment,” and nothing more, is unconstitutionally vague, and is not one of the categories of unprotected speech identified by the Supreme Court. The comments, which define the term as “derogatory or demeaning verbal or physical conduct,” does little to cure the vagueness. Indeed, the ABA departed sharply from the Supreme Court’s definition of “sexual harassment” in the Title IX context, which must be “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” Title VII employs a similar definition for a hostile work environment. The ABA’s nebulous definition does not require the conduct to be “severe” or “pervasive,” nor does it have to “deprive” a student of “educational opportunities.” Rather, a student could file a bar complaint against a professor based on a single fleeting comment in class that he or she deems “derogatory” or “demeaning.”

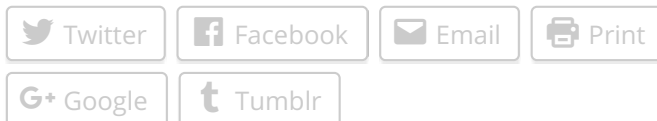
Consider a few examples. First, a professor explains that the Supreme Court’s decision in *Obergefell v. Hodges*, recognizing a right to same-sex marriage, has no grounding in the text or history of the Constitution. A student feels that such a lecture is “demeaning” to the LGBT community.


Indeed, the majority decision in that case stated that the Constitution affords “dignity” in the form of marriage equality. Thus, criticizing the decision is denying dignity on the basis of sexual orientation. Second, a professor explains that the President’s executive action on immigration is unconstitutional, and that aliens without lawful presence should be removable under statutory law. A student feels that such a lecture is “demeaning” to her noncitizen parents on the basis of their national origin. Third, a professor explains that even under the principles of Chevron deference, the term “sex” in Title IX (enacted in 1972) cannot be construed to prohibit discrimination on the basis of gender identity. A student feels that such a lecture is “derogatory” to transgender students. Fourth, a professor contends that affirmative consent laws violate due process. A student, a victim of abuse, finds the lecture “demeaning” on the basis of sex. I could go on, but you get the point. A range of academic theories would be silenced in the classroom under the threat of an unconstitutionally vague standard of “harassment.” These examples should also illustrate another implication of this rule: right-of-center viewpoints in the classroom are at risk of being censored by Rule 8.4(g). Lectures extolling Obergefell, executive action on immigration, anti-discrimination laws, and affirmative consent regimes

would not be deemed “derogatory” or “demeaning.”

The AALS President's Program on Diversity requested submissions that explore the “tensions or synergies between traditional academic values of academic freedom and viewpoint diversity with heightened commitments to racial and other forms of equity and inclusion.” The well-intentioned Rule 8.4(g) will no doubt punish certain behaviors that are unacceptable within the legal community, but at the same time it will chill certain viewpoints and stifle academic freedom. I look forward to discussing this timely and important topic at the 2017 Annual Meeting.

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1 Comment



jimb82 on November 15, 2016 at 9:55 am

When I was in law school, I noted that discrimination on the basis of veteran status or religious belief was prohibited by state or federal law, and I hoped that those students who demanded a particular "diversity" outcome would win their somewhat specious case (they did not) so that I could then bring my own case as a religious veteran who was being discriminated against in my very liberal law school. Perhaps there is an opportunity lurking in Rule 8.4 to hoist discriminators on their own petards.

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8.4(g). I had written before about Rule 8.4(g), including my rejected
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EXHIBIT 9

Eugene Volokh, "Banning lawyers from discriminating
based on 'socioeconomic status' in choosing
partners, employees or experts,"
WASHINGTON POST (Aug. 10, 2016)

The Volokh Conspiracy • Opinion

Banning lawyers from discriminating based on ‘socioeconomic status’ in choosing partners, employees or experts

By Eugene Volokh August 10, 2016

As I mentioned in [my lawyer speech code post](#), the American Bar Association has just adopted a new provision in its Model Rules of Professional Conduct — an influential document that many states have adopted as binding on lawyers in their state. This proposal would allow lawyers to be punished for a wide range of “discrimination and harassment”; I’ve criticized the “[harassment](#)” [ban](#), but here I want to focus on a different aspect of the rule, which I also discussed [when the rule was first proposed](#) (emphasis added):

It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or *socioeconomic status* in conduct related to the practice of law. This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. . . .

Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and *participating in bar association, business or social activities in connection with the practice of law*. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing [diverse] employees or sponsoring diverse law student organizations.

A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Lawyers also should be mindful of their professional obligations . . . to provide legal services to those who are unable to

pay, and their obligation . . . not to avoid appointments from a tribunal except for good cause. A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities.

So let's see how this works as to "socioeconomic status." That term isn't defined in the proposed rule, but the one definition I've seen — interpreting a similar ban on socioeconomic-status discrimination in the Sentencing Guidelines — is "an individual's status in society as determined by objective criteria such as education, income, and employment." *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991); see also *United States v. Peltier*, 505 F.3d 389, 393 & n.14 (5th Cir. 2007) (likewise treating wealth as an element of socioeconomic status); *United States v. Graham*, 946 F.2d 19, 21 (4th Cir. 1991) (same).

All of the following, then, might well lead to discipline if the ABA adopts this rule as part of its influential Model Rules of Professional Conduct, and then states adopt it in turn:


1. A law firm preferring more-educated employees — both as lawyers and as staffers — over less-educated ones.
2. A law firm preferring employees who went to high-"status" institutions, such as Ivy League schools.
3. A law firm contracting with expert witnesses and expert consultants who are especially well-educated or have had especially prestigious employment.
4. A solo lawyer who, when considering whether to team up with another solo lawyer, preferring a wealthier would-be partner over a poorer one. (The solo might, for instance, want a partner who would have the resources to weather economic hard times and to help the firm do the same.)

Back when the rule was limited to actions that were "prejudicial to the administration of justice" and didn't cover ordinary employment decisions, including socioeconomic status as one of the forbidden bases for discrimination may have made sense. For instance, insulting a witness because of his poverty, where the poverty is not relevant to the case, might reasonably be condemned. But now the rule is being broadened far beyond this. And though people pointed out the breadth of the rule when the ABA was first considering it, the ABA did nothing to materially limit the scope of the rule — apparently, it does indeed want to bar lawyers from discriminating based on socioeconomic status in choosing partners, employees and experts.

I think that, more broadly, there's no reason for state bars or state courts to go beyond the existing state and federal anti-discrimination categories when it comes to employment and similar matters. If state law bans, say, sexual orientation discrimination in employment generally, that would normally apply to law firms as well as to other firms. But if a state legislature chose not to ban sexual orientation, gender identity or marital status discrimination, I think that, too, should apply equally to lawyers. State bars and state courts may reasonably impose special rules on behavior in court, behavior with respect to witnesses, and the like; but I don't think they should become employment regulators.

Yet even if state bars and courts do want to regulate employment discrimination, they should certainly not include “socioeconomic status.” To my knowledge, no state anti-discrimination law prohibits such discrimination, and there is very good reason not to prohibit it.

 24 Comments

Eugene Volokh teaches free speech law, religious freedom law, church-state relations law, a First Amendment Amicus Brief Clinic, and an intensive editing workshop at UCLA School of Law, where he has also often taught copyright law, criminal law, tort law, and a seminar on firearms regulation policy.  Follow @volokhc

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